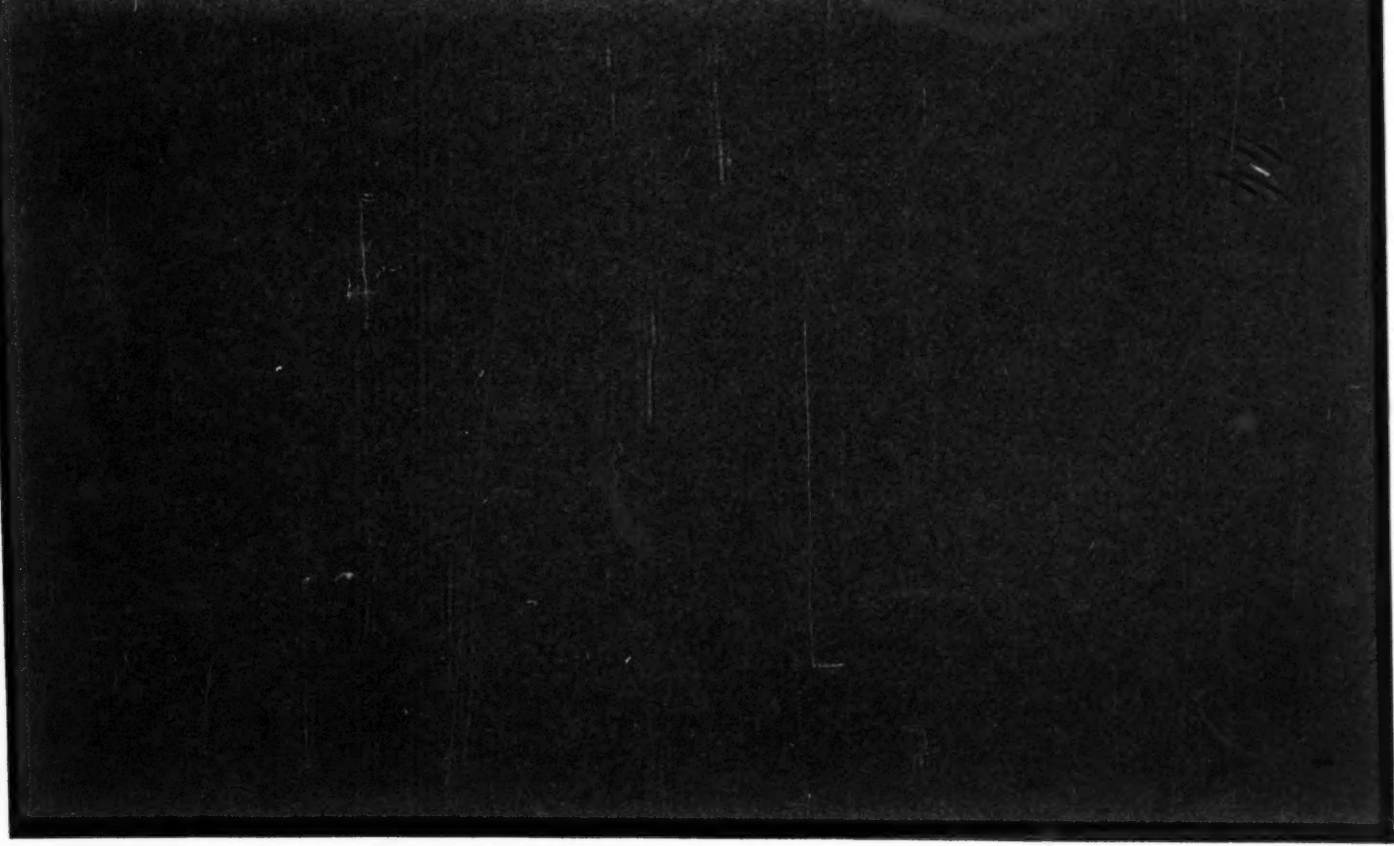

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1952.

No. 201

FRED SLENKER and ELIZABETH SLENKER,
Petitioners,

vs.

GRAND LODGE OF THE STATE OF ILLINOIS OF THE INDEPENDENT ORDER OF ODD FELLOWS,
Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS AND BRIEF IN OPPOSITION.

OPINIONS BELOW.

The opinion of the Appellate Court of Illinois, Second District, is reported in *Slenker* v. *Gordon,* 344 Ill. App. 1.

The Supreme Court of Illinois denied Petition for Leave to Appeal on September 12, 1951 without opinion (R. 27).

The Supreme Court of Illinois dismissed the Writ of Error without opinion on January 16, 1952 (R. 38).

The Supreme Court of the State of Illinois denied Motion to Vacate Order Dismissing Writ of Error without opinion on March 11, 1952 (R. 83).

THE SUPREME COURT OF THE UNITED STATES LACKS JURISDICTION TO GRANT PETITION FOR WRIT OF CERTIORARI IN THIS CAUSE.

A. This Court is without jurisdiction to grant the writ under 28 U.S.C.A. 1257 (3) as invoked by the petitioners, for the reason that the constitutional rights now contended to have been violated were not set up or claimed in the state court at the proper time or in the proper manner. (See Statement p. 3 and Brief p. 7).

B. The judgment of the state court sought to be reviewed was rendered without opinion or assignment of reasons and can be amply sustained on non-federal grounds. (See Statement p. 3 and Brief p. 16.)

C. Even though the jurisdictional requisites were present, there has not been any showing that petitioners' constitutional rights have been violated by reason of the rule of the state court that the trust funds of a charitable organization are exempt from liability for the wrongful acts of its agents or servants. (See Brief p. 20)

STATEMENT OF THE CASE.

Respondent finds it necessary to make a corrected statement to supply facts not included in petitioners' statement, and to clarify the issues determined by the judgments of the State Courts.

Suit was filed to recover damages for personal injuries which petitioners alleged they sustained when their automobile, and one driven by David W. Gordon, collided on the public highway of Illinois. After certain motions were disposed of, and amendments made, the defendants remaining were Gordon, individually, and respondent. On the eve of the trial, the Court granted a severance of defendants and the trial proceeded against respondent alone (R. 129). The basis for liability claimed against respondent was that at the time of the collision, Gordon was acting as its agent or servant.

Respondent answered, denying liability generally; denied that Gordon was acting as its agent or servant at the time in question, and as an alternative, alleged it was organized pursuant to a special act of Illinois, and that its purposes and services were in furtherance of a public charity, and, being a charitable institution, it was exempt under Illinois law from liability for the negligent acts of its servants or agents.

Petitioners' reply to respondent's answer consisted of a denial that respondent's purposes and services rendered by it constituted a public charitable institution. In the pleading, and throughout the court proceedings on appeal, the petitioners contended respondent was a fraternal, benevolent organization.

At no time in the pleadings, during the trial, or in any of the proceedings on appeal, did petitioners raise the question that an adverse decision with respect to the charitable defense raised by the respondent would in any way infringe any right guaranteed by the Constitution.

During the trial before the jury, it was stipulated that the question of fact as to whether respondent was a public charitable institution should be withdrawn from the jury, and determined by the Court. (R. 31 and 284). At the close of all the evidence, the defendant moved for a directed verdict, asserting as grounds therefor that there was no evidence which tended to prove that Gordon, at the time of the collision, was acting as its agent or servant. The motion was overruled. Cross errors were assigned by respondent on appeal but the Appellate Court did not find it necessary to pass on the question raised by such motion.

After the verdicts were returned in favor of petitioners, respondent moved for a judgment notwithstanding the verdict, on the ground that the evidence showed it to be a public charitable organization and as such was exempt under Illinois law from liability for damages caused by the wrongful act of its agent or servants. The motion was allowed and judgment entered for respondent (R. 298).

No contention was made that the trial court's action in allowing the motion for judgment notwithstanding the verdict violated any of petitioners' constitutional rights (R. 31).

Petitioners appealed to the Appellate Court and on review the judgment was affirmed. Petitioners' request for a rehearing was allowed, and on reconsideration, the judgment was again affirmed. (Opinion of Appellate Court July 12, 1951.) (R. 34).

In accord, and within the time prescribed by the rules of the Court, petitioners petitioned the Supreme Court for

a leave to appeal from the judgment of the Appellate Court. Answers of respondent and briefs for respective parties were filed, and on September 12, 1951, the Court denied the petition (R. 27).

No claim was made in the Supreme Court by petitioners that judgment entered deprived them of their constitutional rights.

On October 11, 1951, petitioners filed an original action in the Supreme Court suing out a writ of error to review the judgment of the Appellate Court. The judgment and record sought to be reviewed in the writ of error action was the same judgment on which the Supreme Court had denied a petition for leave to appeal. The errors assigned in the writ of error action consisted of the errors assigned in the Appellate Court, and in addition, assignments were made in which petitioners attempted to claim that the entering of the judgment in the Appellate Court had violated their constitutional rights (R. 306).

Scire facias to hear errors issued out of the Supreme Court on request of petitioners and also served on respondent commanded it to appear in the next term of Court to be held the second Monday of January (January 14, 1952). Respondent was served more than twenty days prior to the opening day of the January term of the Supreme Court and appeared on January 14, and filed a motion to dismiss the writ of error action. Ten reasons were assigned in support of such motion, and affidavit and suggestions attached in support of the motion. Proof of service was made showing that the principal counsel for petitioners had been furnished with copies and exhibits so filed (R. 44).

On the 16th day of January, the Court allowed respondent's motion and no opinion was filed assigning reasons in support of the action taken. On February 1, petitioners

moved to vacate the order of January 16, and in support of the motion they set up that after the writ of error action had been docketed, petitioners applied to one of the Justices for an extension of time within which to file abstracts and briefs, and that pursuant to such application, time was extended for filing abstracts and briefs to February 13 (R. 44).

It was alleged that the Court's action dismissing the writ of error case before their briefs had been filed deprived them of constitutional rights. The motion to vacate was denied March 11, 1952 (R. 83).

On April 26, petitioners filed a further motion praying that they be granted leave to file in said writ of error action copies of their abstracts of record. Motion was denied but the abstracts of record have been included by stipulation in the record in this case and appear (R. 88, 308).

THE ARGUMENT.

A. This Court is without jurisdiction to grant the writ under 28 U.S.C.A. 1257 (3) as invoked by the petitioners, for the reason that the constitutional rights now contended to have been violated were not set up or claimed in the state court at the proper time or in the proper manner.

1. JURISDICTIONAL FEATURES.

Petitioners seek to invoke the jurisdiction of this court under the provisions of 1257 (3) 28 U.S.C.A.

Respondent contends they have not the burden cast on them of affirmatively showing the constitutional rights now claimed to have been violated were set up or claimed at the time or in the court necessary to confer jurisdiction.

Under state law, every final order and judgment may be reviewed by notice of appeal in either the Appellate or Supreme Court. Certain prescribed jurisdictional requisites direct the appeal to a particular court. In a case of this character, on the question under inquiry, the court to which the appeal may be taken depends on the presence or lack of debatable constitutional question which has been passed on by the trial court. If it is present the appeal is of right direct to the Supreme Court—otherwise it is to the Appellate Court. These jurisdictional requisites are of long standing and clearly and definitely mark the proper route to take in appealing a case from the trial court. However, there are no rights lost if a litigant appeals to the Supreme Court when no jurisdictional grounds are stated for that court transfers the entire record to the Appellate Court.

If an appeal be taken to the Appellate Court and a constitutional question appears in the record the appellant will be deemed to have waived the constitutional question and the court will determine the other questions preserved in the record.

The constitutional rights now claimed were not presented in the trial court and were not a factor in determining the court to which the appeal should be taken. The judgment of the Appellate Court and the order of the Supreme Court denying leave to appeal were made without any consideration of the Federal constitutional rights now urged.

Petitioners contend that under Sec. 11, Art VI of the State Constitution, Statutes and decisions, they had the right to have the constitutional questions determined in the writ of error action filed in the Supreme Court to review the judgment of the Appellate Court.

Respondent concedes such a right of review exists under state law, subject, however, that the right to the writ is restricted to those cases where the judgment of the Appellate Court raises for the first time a constitutional question. The application of the rules requires that all constitutional questions which appear or could properly be raised in the trial court must be submitted to that court, passed upon, and be subject to review by the statutory notice of appeal. If the constitutional question is of such nature the Supreme Court cannot assume jurisdiction by writ of error action.

The element of the time when the question arose is material to the jurisdiction of the Supreme Court to review by writ of error action.

Respondent's claim of immunity first arose when it pleaded that it was a charitable organization devoted solely to public acts of charity and that by reason thereof was ex-

empt from liability for the negligent acts of its agents and servants committed to the scope of their employment. The constitutional claim could have been presented in opposition to respondent's evidence of its charitable purposes. Respondent's motion for judgment notwithstanding the verdict was a direct challenge to the constitutional rights petitioners claimed in the writ of error action. It is urged that the petitioners' alleged constitutional right to have judgment on the verdict, arose in the trial court and should have been raised in that court. Failure to urge such question at that time constituted a waiver of the right to urge it. Had petitioners then claimed that the loss of the verdicts was an invasion of Federal constitutional rights, the question would have been preserved in the trial court record and subject to review by regular procedure following the method of appeal first described.

The requirement of state law that constitutional questions in the trial court may not be reserved by a party to be used after he has exhausted his right of review as the basis of a writ of error action to the requirement of 28 USCA 1257 (3) that the right claimed must be set up and claimed under the constitution. It has been held that such requirement of assertion of right demands that it be specially set up or claimed at the proper time and in the proper way. In *Mutual Life Ins. Co. of New York* v. *McGrew,* 188 U. S. 291; 23 S. Ct. 375; 47 L. Ed. 480 cited in the attached brief, it was said: "The proper time is in the trial court whenever that is required by the state practice, in accordance with which the highest court of a state will not revise the judgment of the court below on questions not therein raised."

It is submitted that this court is without jurisdiction.

AUTHORITIES IN SUPPORT OF ARGUMENT ON JURISDICTIONAL FEATURES.

On petition for certiorari the record should affirmatively show that the right relied upon was specially set up or claimed under the constitution at the proper time and in the proper way.

Memphis Natural Gas Co. v. *Beeler*, 315 U.S. 649; 86 L. Ed. 1095.

Mutual Life Ins. Co. of New York v. *McGrew*, 188 U.S. 291; 23 S. Ct. 375; 47 L. Ed. 480.

If the highest court of the State declined to consider the constitutional questions because not raised in accord with state practice, which is reasonable and well established, the United States Supreme Court is without jurisdiction to consider them.

Chicago I. & L. R. Co. v. *McGuire*, 196 U.S. 172; 49 L. Ed. 413.

Pennsylvania R. Co. v. *Illinois Brick Co.*, 297 U.S. 447; 56 S. Ct. 556; 80 L. Ed. 796.

Sec. 198, Chap. 110, Ill. Rev. Stat. of Ill. 1951 provides in part as follows:

> "Method of Appellate review. (1) Every order, determination, decision, judgment or decree, rendered in any civil proceeding, if reviewable by the Supreme or Appellate Court of this State by writ of error, appeal or otherwise, shall hereafter be subject to review by notice of appeal * * *." (After January, 1934).

Sec. 199, Chap. 110, Ill. Rev. Stat. of Ill. 1951 provides in part as follows:

> "Jurisdiction of Appellate and Supreme Courts. (1) Appeals shall be taken directly to the Supreme Court

in all cases in which a franchise or freehold or the validity of a statute or the validity of a county zoning ordinance or resolution or a construction of the constitution is involved * * * "

Section 32, Chapter 37 of Ill. Rev. Stat. 1951 provides in part as follows:

"The said Appellate Court created by this act shall exercise appellate jurisdiction only and have jurisdiction of all matters of appeal or writs of error from the final judgments, orders or decrees of any of the circuit courts or the superior court of Cook County, of county courts or from the city courts. * * * Appeals and writs of error shall lie from the final orders, judgments or decrees of the circuit and city courts and from the superior court of Cook County directly to the Supreme Court in all criminal cases and in cases involving a franchise or freehold or the validity of a statute."

It has been held by the State Supreme Court that Section 11, Article VI of the State Constitution confers a jurisdiction on it to review judgments of the Appellate Court under certain restrictions.

To give the Supreme Court jurisdiction to review a judgment of the Appellate Court upon writ of error, on the grounds a constitutional question is involved, such question must have arisen in the Appellate Court for the first time.

Bradford Supply Co. v. *Waite*, 392 Ill. 318.
Abrams v. *Awotin*, 388 Ill. 42.
Merlo v. *Public Service Co. of Northern Illinois*, 381 Ill. 300.

If a reviewable constitutional question appears *in the record of the trial court* but the aggrieved party appeals to the Appellate Court instead of to the Supreme Court, he will be deemed to have waived his constitutional claim for

the reason that he has taken the appeal to a court which has no power to review constitutional questions.

Hass Electric v. *Amusement Park Co.*, 236 Ill. 452.
Lukin v. *Lake Shore and Michigan S. Ry. Co.*, 248 Ill. 377.

2. The State of Illinois makes ample provisions for challenging the common law policy of this State on constitutional grounds but such challenge must be made at the first opportunity.

To explain the fact that the question now urged was not "specially set up or claimed" in the trial court, in the Appellate Court on appeal or on rehearing, nor in the Petition for Leave to Appeal in the Supreme Court, nor in the Petition to Reconsider Denial of Leave to Appeal in the Supreme Court, petitioners now advance the theory that there is no way of raising these particular questions in the court system of Illinois.

There are certain types of questions of which the Supreme Court alone has jurisdiction. These are: Cases involving a franchise, a freehold, the *validity* of a statute, or construction of the constitution. These cases must go directly to the Supreme Court by virtue of the provisions of Article VI, Section 11 of the Illinois Constitution and by virtue of the implementing statutes (Chap. 37, Section 32, Ill. Rev. Stat.) and Chapter 110, Section 199, Ill. Rev. Stat. It is therefore manifestly incorrect for petitioners to suggest that "the phrase within the meaning of the statute authorizing appeals direct to this Court adds nothing to the statement is not a constitutional question" (cited from *Moore* v. *Moyle*, 399 Ill. 230). It has much meaning and explains the procedural aspects of appeals in Illinois.

It has further become the rule that an appeal to the Appellate Court will constitute a waiver of these rights because, very soundly, since the Appellate Court has no jurisdiction over a matter exclusively left to the Supreme Court, the litigant must of necessity have waived his right. And the cited cases (*Hass Electric* v. *Amusement Park Co.*, 236 Ill. 452; *Luken* v. *Lake Shore and Michigan S. Ry. Co.*, 248 Ill. 377) stand only for the proposition that if the *validity* of a statute is involved, the constitutional question will be waived by an appeal to the Appellate Court.

In the present case there is no statute involved—but only a common law right and every Illinois lawyer knows that the appeal may be made to the Appellate Court. But it by no means follows that the point that petitioners' constitutional guarantees have been infringed could not be raised either in the trial court, nor decided by the Appellate Court. One such case involving the 14th Amendment was decided as late as June 4, 1952 by the Illinois Supreme Court.

Smith v. *Department of Registration and Education*, ... Ill. ..... 106 N.E. 722.

In the event there is any doubt as to whether the case is one over which the Supreme Court has exclusive jurisdiction, an appeal directly to the Supreme Court can be made in the interest of caution and the case will simply be transferred to the appropriate Appellate Court by virtue of Chapter 110, Ill. Rev. Stat. Section 210, which provides:

> "Where an appeal is taken either to the Supreme or Appellate Court and it is found or adjudged that the case was wrongly appealed to such court, it shall be the duty of such court to direct the clerk to transmit the transcript and all files therein with the order of transcript to the proper court. * * * "

It has already been pointed out that petitioner's lawyers were the attorneys in the case of *Moore* v. *Moyle*, 399 Ill.

230; also in *Moore* v. *Moyle,* 335 Ill. App. 342, and *Moore* v. *Moyle,* 405 Ill. 555. In those cases the precise question was involved as is involved here and arose in the following manner:

Suit was brought against Bradley University under a tort theory of liability. Bradley University moved to dismiss the action because it was a charitable corporation and *could not be sued* in an action of tort for negligence. The court granted the motion to dismiss. The plaintiff (represented by the same attorneys who are involved in this petition) moved to set aside the order dismissing the complaint on the ground that "the rule which holds that a charitable corporation is not liable in tort is a direct violation of the provision of the Constitution of the United States and the Constitution and laws of the State of Illinois." This motion was denied and plaintiff took an appeal to the Supreme Court of the State of Illinois. That court, in *Moore* v. *Moyle,* 399 Ill. 230, *simply* held that the provisions of Chapter 110, Section 199 of the Ill. Rev. Stat. providing for those types of cases upon which a direct appeal may be made to the Supreme Court did not apply, since the validity of a statute nor a debateable constitutional question were involved. It transferred the case to the *Second District* Appellate Court. The *Second District,* in *Moore* v. *Moyle,* 335 Ill. App. 342, was therefore called upon to decide the question as to whether or not the trial court in applying the common law policy granting immunity to a charitable corporation violated the provisions of the Constitution of the United States and the Constitution and laws of the State of Illinois. It had jurisdiction to make that decision because the Supreme Court had so directed it to decide the issue. It decided the case adversely to the plaintiff, clearly demonstrating that the petitioners here are in error in asserting that "the State of Illinois pro-

vides no means by which the common law policy of that State may be challenged or tested or governed by or subjected to the 14th Amendment." The decision of the Appellate Court was then appealed to the Supreme Court and that Court in *Moore* v. *Moyle,* 405 Ill. 555, decided that the Illinois rule granting immunity to charitable corporations for the torts of its servants and agents did not apply where there was liability insurance or where the pleadings in the trial court showed that there were non trust funds available for the payment of a judgment.

These series of cases in *Moore* v. *Moyle* demonstrate several things:

1. That the attorneys for present petitioner knew on July 15, 1946 when they filed their motion to set aside the trial court's order in *Moore* v. *Moyle* that the constitutional question had to be raised at that time (Incidentally, none of the attorneys representing petitioner here were representing the petitioner in the present cause until after the Supreme Court had dismissed the petition for leave to appeal, which probably explains why the constitutional question was not raised in the trial court in this case.)

2. That the State of Illinois does provide the machinery for the decision of whether or not the common law policy of the State of Illinois violates rights guaranteed to the plaintiff by the 14th amendment to the Constitution of the United States.

3. These cases demonstrate clearly that while the Supreme Court of Illinois has exclusive jurisdiction over certain types of cases, that it by no means follows that simply because the Supreme Court will not entertain jurisdiction on direct appeal that the litigant is thereby foreclosed from raising the question. The Supreme Court of Illinois is simply complying with the legislative mandate of this State

in refusing to entertain jurisdiction where the validity of a statute is not involved and it thereupon tranfers the cause to the Appellate Court where that court then must decide the issue presented.

It is submitted that the language of the Supreme Court in *Moore* v. *Moyle*, 399 Ill. 230, "where a judgment or decree is attacked on the grounds that its enforcement will deprive the one against whom it is sought to be enforced, of some constitutional right, no constitutional question is presented which authorizes a direct appeal to this court. The question involved in such a case is the validity of the judgment or decree and is not a constitutional question within the meaning of the statute which authorizes appeals direct to this court," amply demonstrates that it is the procedural statute about which the court is speaking and that the court is simply recognizing that "the validity of the judgment or decree" does not come within the meaning of the statute authorizing a direct appeal to the Supreme Court. The court's action in transferring the case to the Appellate Court shows that the Appellate Court does in fact have jurisdiction to decide constitutional questions identical with the one raised in the present case.

B. The judgment of the state court sought to be reviewed was rendered without opinion or assignment of reasons and can be amply sustained on non-federal grounds.

It has been pointed out that the jurisdiction of the State Supreme Court to review the judgment of the Appellate Court by writ of error action did not attach unless it appeared that the constitutional question arose for the first time in the Appellate Court. Since the constitutional question did not arise for the first time in the Appellate Court but was present and could have been presented in the trial court, there was no jurisdictional basis for the Supreme Court to retain the writ of error action. The order of

January 16 dismissing the cause can be sustained on the ground that the court was without jurisdiction and such grounds are non-federal.

In *Copperweld Steel Co.* v. *Industrial Commission,* 324 U. S. 780, 89 L. Ed. 1363, it was held that this Court would not assume jurisdiction in a certiorari proceeding to require the State Supreme Court to exercise a jurisdiction which it found had not been conferred upon it by the laws of the State.

Petitioners contend that the entry of the order of January 16th dismissing the writ of error action infringed upon their constitutional rights of due process for the reason that they had been granted an extension of time within which to file abstracts and briefs and that such extension had not expired when the cause was dismissed.

The writ of error action was filed, *scire facias* issued, and served on respondent commanding it to appear at the first day of the next January term (January 14). (It was docketed to the March term as is stated in the petition).

Rule 63 of the Supreme Court (Chap. 110 §259.63 Ill. Rev. Stat.) provides in substance that the first day of each term shall be the return day for the return of process and that no party shall be required to answer unless he has been served 20 days before the return day. As stated, respondent was served more than 20 days prior to the opening of said term and therefore was required to appear and file its pleading. Rule 61 of the State Supreme Court (Chap. 110 §259.61 Ill. Rev. Stat.) provides that the writs of error shall be directed to the Clerk of the Court in which the judgment complained of was entered and that such Clerk shall file a transcript of the record with the reviewing court. The record before us does not affirmatively show the transcript of record filed with the Supreme Court but it

does appear that the record of the Appellate Court was abstracted and became a part of this record by stipulation (R. 96-300).

Respondent's motion to dismiss the writ of error action contained among other grounds, the following:

(a) That they have waived all alleged constitutional questions by their failure to present them to the trial court.

(b) That the points urged for the first time in this case are not such constitutional questions as will confer jurisdiction on this court to entertain a writ of error action (R. 29).

It is clear that the jurisdiction of the Supreme Court of Illinois was challenged in the motion to dismiss. It is also clear that the constitutional question which petitioners relied upon to give the court jurisdiction in the writ of error action did not arise for the first time in the Appellate Court and without such showing the Supreme Court was without jurisdiction to retain the case and the motion to dismiss was allowed. It is not claimed by petitioners that their abstract of record or briefs which they had expected to file would in any way cure the jurisdictional defect as it then appeared on the records of the case. The assignment of errors filed in the writ of error action did not set forth facts showing that the jurisdictional requisite appeared in the record.

There is an additional non-federal ground on which the Supreme Court of the State of Illinois might well have dismissed the writ of error because of its lack of jurisdiction, that is, that petitioners having already exhausted every right of appeal granted to it by the Practice Act and Rules of the Supreme Court, were not entitled to an additional review by writ of error. The only cases which the Supreme

Court will review by writ of error, in addition to the right of review by petition for leave to appeal, are those cases which it is mandatory for it to consider by virtue of Section 11 of Article VI of the Constitution of the State of Illinois. The court very obviously considered that this was not the type of case which it must consider or otherwise it would of necessity have refused to dismiss the writ of error. Such a mandatory case was illustrated by the case of *Altchuler v. Altschuler*, 410 Ill. 169, cited by petitioners, but in that case the Appellate Court for the first time in the cause, despite the fact that there were no pleadings to support it nor any appeal from the trial court on the question, decided that a freehold was involved and under such finding, the Supreme Court took jurisdiction and determined the issues.

As has already been pointed out, unless the Appellate Court itself makes a decision for the first time in the case in that court involving one of the types of cases which the Supreme Court must decide by virtue of Section 11, Article VI of the Constitution of the State of Illinois, then the Court has no jurisdiction to consider the question by any other means than by petition for leave to appeal, which right in this case had already been exhausted.

We should also like to suggest that petitioner in the assignments of error in the writ of error proceeding took the position that the constitutional question did not arise in the trial court or in the Appellate Court, but arose only after the Supreme Court of Illinois had decided the case adversely to it. As we understand their Petition for Certiorari, that is still their position. In other words, there was no constitutional question in the case if they won the point—but only in the event the decision was adverse. We think this Court has already announced that there is no constitutional right to win a lawsuit.

But certainly this position had the effect of pleading the petitioner out of Court. The Supreme Court of Illinois has no jurisdiction to issue a writ of error to itself. It has no jurisdiction to issue a writ of error to the Appellate Court after 40 days have expired unless there is a mandatory constitutional question involved which arose in the Appellate Court for the first time.

It is respectfully submitted that the order sought to be reviewed can be sustained on non-federal grounds.

C. Even though the jurisdictional requisites were present, there has not been any showing that petitioners' constitutional rights have been violated by reason of the rule of the state court that the trust funds of a charitable organization are exempt from liability for the wrongful acts of its agents or servants.

As petitioner has conceded, there are some thirty-two of the forty-eight states which presently have a common law policy granting some type of immunity in an action in tort to charitable institutions. The number has been greater in the past and at one time practically every state granted some type of immunity. This was accomplished in a number of ways—usually under the Trust Fund theory —but also on the ground that since a charity in performing its function was performing duties of the State, that the charity was therefore entitled to the same immunity as the State. Regardless of the reasoning used, the fact remains that the great majority of the states still adhere to the rule as the Public Policy of that state.

Is it not strange that throughout the venerable history of this rule the petitioner has been unable to find a single case in which either a state or a Federal Court has held that the exemption accorded a charity violates the Federal Constitution. (The dictum in *Nicholson* v. *Good Sa-*

maritan Hospital, 145 Fla. 360, is the only case wherein a State Court has inferred that the rule violated the constitution of a state.)

The contention that a state must over-rule its common law rule which has stood for generation after generation without attack or else the petitioner is deprived of constitutional rights is unthinkable and certainly overlooks the fact that this Court has repeatedly held that the State may alter or retire common law policy without violating the Constitution even if it means that a remedy has been altered or destroyed.

In the vast number of compensation cases which have reached the Supreme Court of the United States, this Court has consistently held:

(a) That the defense of contributory negligence may be abolished.

(b) That the fellow servant rule may be abolished.

(c) That the employee's right at common law (wherein extremely large verdicts were involved) may be abolished, and an entirely different remedy (though inadequate) substituted.

Jeffrey Mfg. Co. v. *Blagg,* 235 U. S. 571, 35 S. Ct. 167, 59 L. Ed. 364.

Arizona Employers Liability Cases, 250 U. S. 400, 39 S. Ct. 553, 63 L. Ed. 1053.

This Court, and state courts, have consistently held that it was within the province of the State to remove the liability of the driver of an automobile to his guest as the result of simple negligence—thereby, of course, approximately the present immunity.

Silver v. *Silver,* 50 S. Ct. 57, 281 U. S. 117, 74 L. Ed. 221.

Naudzius v. *Lahr,* 253 Mich. 216, 234 N. W. 581.

There has never been any question that it was within the power of the State to impose liability upon the owner of a car for the negligence of the driver even though there was no agency. Can it be doubted that the same liability could be removed?

Oneill v. *Williams*, 71 Cal. App. 668, 15 Pac. (2d) 879.

This Court has held that the Federal government and the States may pass on their immunity to those corporations performing the services of the state.

Keifer and Keifer v. *Reconstruction Finance Corp.*, 306 U. S. 381, 83 L. Ed. 784.

If the rule contended for the petitioner is to be adopted by this Court, it must surely follow that the various states will no longer have the power to make any determinations of public policy that certain types of property should be exempted from liability. It is submitted that it would necessarily follow that every state must alter its rules with respect to:

1. The homestead exemption.
2. The garnishment exemption.
3. The rules upholding spendthrift trusts.
4. The bankruptcy rules permitting certain exemptions.
5. The laws forbidding execution against certain household goods and tools of trade.
6. The state laws exempting municipal corporations and states from liability of the torts of its agents and employees.

Surely no one can contend that a state does not have the authority to say that it is to the best interests of the state and that Public Policy demands that certain types of prop-

erty should be exempt from liability—and that in so doing the Constitution of the United States is not infringed. And that is all that is involved here. The petitioner has conceded the correctness of the Trial Court's decision that this was a public charity. It had to do this because the proof conclusively showed that its entire funds were devoted to the maintenance of two institutions—an Old Folk's Home and an Orphans' Home.

It cannot be successfully argued that Federal constitutional rights prohibits the State of Illinois from holding that the funds of a charitable corporation may be exempted from liability.

CONCLUSION.

For the foregoing reasons, the Petition for Writ of Error should be denied.

All of which is respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951

No. 201

FRED SLENKER and ELIZABETH SLENKER,
Petitioners,

vs.

GRAND LODGE OF THE STATE OF ILLINOIS OF THE INDEPENDENT ORDER OF ODD FELLOWS,
Respondent.

REPLY TO ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners have carefully examined the Answer to their Petition and have noted a basic misunderstanding of the issues by respondent. At pages 2, 17, and 20 to 23 of the Answer respondent states that the rule petitioners state to be the rule that violates their constitutional rights is the "rule of the state court that the trusts funds of a charitable organization are exempt from liability for the wrongful acts of its agents or servants." It probably does. But

the rule here objected to is rather the rule of the state court that a charitable corporation is not liable to judgment in an action brought against it by a stranger when it is not presently possessed of non-trust property at the time of trial.

It is true as stated at page 5 of the Answer that respondent was required as defendant-in-error to appear before the Supreme Court of Illinois on January 14, 1952, but it is not true that it was required to file a motion to dismiss the writ of error at that time or that the Supreme Court of Illinois had a right to entertain the motion and to dismiss the writ of error at that time.

It is also true as stated at page 6 of the Answer that petitioners as plaintiffs-in-error filed a motion alleging "that the Court's action dismissing the writ of error case before their briefs had been filed deprived them of constitutional rights" but that was by no means the sole ground on which it was alleged that their constitutional rights had been denied by the action of the Supreme Court of Illinois in doing so. See Motion To Vacate Order Of Dismissal (Rec. 39) and the Supplemental Motion To Vacate (Rec. 81). See Petition pp. 4-8, and 13 (Q. No. 6).

Reply to Respondent's Argument A-1.

At pages 8-9 of its Answer respondent states:

> "Respondent's claim of immunity first arose when it pleaded that it was a charitable organization devoted solely to public acts of charity and that by reason thereof was exempt from liability for the negligent acts of its agents and servants committed to [*sic*] the scope of their employment."

That is true.

Respondent continues:

> "The constitutional claim could have been presented in opposition to respondent's evidence of its charitable purposes."

That is theoretically true.

Respondent contends:

> "Respondent's motion for judgment notwithstanding the verdict was a direct challenge to the constitutional rights petitioners claimed in the writ of error action."

That is true.

Respondent argues:

> "It is urged that the petitioners' alleged constitutional right to have judgment on the verdict, arose in the trial court and should have been raised in that court."

That is what counsel for appellant argued in *Moore* v. *Moyle*, 399 Ill. 230. The Supreme Court of Illinois held that no constitutional question arose in the trial court.

Respondent states:

> "Failure to urge such question at that time constituted a waiver of the right to urge it."

But how could there be a waiver if, as the Supreme Court of Illinois held in *Moore* v. *Moyle*, 399 Ill. 230, no constitutional question could arise in the trial court when a motion raising such questions is denied by the trial court? (See Motion at pp. 28 to 32 of Abstract filed in *Moore* v. *Moyle* which accompanies this Reply.)

Respondent claims:

> "Had petitioners then claimed that the loss of the verdicts was an invasion of Federal constitutional rights, the question would have been preserved in the trial court record and subject to review by regular procedure following the method of appeal first described."

The *Moore* v. *Moyle* cases, 399 Ill. 230; 335 Ill. App. 342; and 405 Ill. 555, belie any such contention. That procedure is a blind alley.

Counsel agree with the decision of this Court in *Mutual Life Ins. Co. of New York* v. *McGrew*, 188 U.S. 291, that a constitutional question must be raised in the trial court when "that is required by the state practice." But we most vehemently assert that it cannot be said to be the practice in the State of Illinois when it would be perfectly fruitless to raise the constitutional question in the trial court as shown by the *Moore* v. *Moyle* cases. For the Supreme Court of Illinois distinctly held in *Moore* v. *Moyle*, 399 Ill. 230 and 405 Ill. 555, that no constitutional question arose in the trial court although the immunity rule was specifically attacked on constitutional grounds in the trial court. See Abstract in *Moore* v. *Moyle*, pp. 29-30. Is it conceivable that a state will or may require a litigant to do a useless thing in the trial court in order to preserve a constitutional question for review?

At page 11, under Authorities In Support Of Argument On Jurisdictional Features, respondent states in its Answer:

> "If a reviewable question *appears in the record of the trial court* but the aggrieved party appeals to the Appellate Court instead of the Supreme Court, he will be deemed to have waived his constitutional claim for the reason that he has taken the appeal to a court which has no power to review constitutional questions." (Italics theirs.)

Petitioners agree that the Appellate Court has no power to decide such questions. They disagree with the balance of the statement as it stands. It would be a correct statement of law if it was qualified by the words "provided it raises a question which the Supreme Court of Illinois will consider on direct appeal." The questions here presented and

presented to the Supreme Court of Illinois on writ of error are questions which the Supreme Court of Illinois has held do not give rise to a constitutional question authorizing a direct appeal even though presented to and passed on by the trial court. *Moore* v. *Moyle*, 399 Ill. 230; 335 Ill. App. 342; 405 Ill. 555. How could there be any waiver where it would be perfectly useless to present the question purportedly waived to the trial court for decision, the Supreme Court would not review the case on direct appeal, and the Appellate Court has no jurisdiction to determine the issue?

Reply to Respondent's Argument A-2.

At page 12 counsel for respondent have categorically stated that Illinois makes ample provisions for challenging the common law policy of the State on constitutional grounds. After carefully reading the section of respondent's Answer above referred to devoted to developing that thesis petitioners' attorneys are left without chart or compass to arrive at the destination suggested by our opponents. It is characteristic of their argument that counsel for respondent seem to have corralled several horses and galloped off madly in various directions. On page 13 of the Answer they say the Appellate Court has no jurisdiction of constitutional questions. On page 14 of their answer they say that in the case of *Moore* v. *Moyle*, 335 Ill. App. 342, the Appellate Court of Illinois had jurisdiction over the constitutional issues two of present counsel for petitioners had attempted to present to the Supreme Court of Illinois, because they say the Supreme Court had directed it to decide those issues. Knowing that a party has a right to have a constitutional issue decided by some appellate court, respondent, not being able to discover a court with the requisite jurisdiction to determine the constitutional questions raised when the common law policy of the state is attacked on constitutional grounds, has decided to fix

jurisdiction in the very Appellate Court it elsewhere acknowledged has no such jurisdiction. Even a casual glance at the Supreme Court opinion in *Moore* v. *Moyle*, 399 Ill. 230, discloses that no such direction was given. Even a less than casual glance at the opinion in *Moore* v. *Moyle*, 335 Ill. App. 342, discloses that the Appellate Court decided no such issues. It did not purport to do so, the reference to constitutional questions being merely an aside remark commenting on the number of pages in the briefs which had been prepared for and submitted to and used by the Supreme Court of Illinois in determining the direct appeal in *Moore* v. *Moyle*, 399 Ill. 230, and which were bodily transferred to the Appellate Court when the cause was transferred to the Appellate Court, no new briefs being filed, the entire record as respondent notes at page 7 of its Answer being transferred to the Appellate Court. Rule 47 of the Supreme Court of Illinois provides that:

> "upon an order for transference being made all documents already filed in the wrong court shall be transmitted by the clerk to the proper court, and the case shall proceed from that point in all respects as though the appeal had originally been taken to the proper court." (Ill. Rev. Stat. Ch. 110, Sec. 210.)

In the second appeal to the Supreme Court in *Moore* v. *Moyle*, 405 Ill. 555, the Supreme Court said it (not the Appellate Court) had decided the constitutional issues. The Supreme Court of Illinois has held that the Appellate Court has no jurisdiction to decide a case on constitutional grounds and when it does so its decision is a nullity. In *People* v. *Kingery*, 368 Ill. 205, for example, the trial court in a mandamus proceeding held that the defendant was under a duty to institute a proceeding under the Eminent Domain Act for the purpose of determining what damages were suffered by the petitioner by reason of a change in grade in a highway "under the statutes and Constitution of

this State." The Appellate Court reversed the judgment solely on constitutional grounds, i.e., its own construction of the Constitution. The Supreme Court of Illinois said:

> "It is clear that a constitutional question is necessarily involved in this case * * * the Appellate Court * * * based its opinion on its construction of the Constitution. This it was *without* jurisdiction to do. The only power that court had in the premises was to transfer the cause to this court, and any other order entered by it in this cause is *coram non judice* and *ineffectual for any purpose. Schmidt* v. *Barr*, 328 Ill. 365; *Kowalczyk* v. *Swift & Co.*, 317 Ill. 312. * * * The judgment of the Appellate Court, being *void*, is vacated, the order of submission is set aside, and the cause will be treated as transferred to this court for decision of all the issues." (Italics ours.)

And the Illinois Appellate Courts have always held they have no jurisdiction to decide constitutional questions even when the case comes to them by transfer from the Supreme Court of Illinois. *Prudential Insurance Co.* v. *Richman*, 292 Ill. App. 261. Obviously, the Appellate Court decided no constitutional question in *Moore* v. *Moyle*, 335 Ill. App. 342.

The series of cases in *Moore* v. *Moyle*, 399 Ill. 230, 335 Ill. App. 342, and 405 Ill. 555, establishes only that counsel for present petitioners when they were involved in that case believed that the constitutional question should have been raised in the trial court. Their minds were quickly disabused of this belief by the Supreme Court of Illinois which held that the question was not one of constitutionality of a common law rule but whether the decision was right or wrong. Respondent attempts at pages 13 and 16 of its Answer to justify the Supreme Court in its refusal in *Moore* v. *Moyle*, to review that case on direct appeal on the ground that by statute it had no jurisdiction unless the validity of a statute is involved overlooks the fact that

the Supreme Court of Illinois under the same statute as that governing appeals where the validity of a statute is involved (Sec. 199, Ch. 110, Ill. Rev. Stat.) has jurisdiction on direct appeal where the construction of the Constitution is involved and the construction of the Constitution is involved when a claim is advanced that a statute or common law rule is invalid because of it. But whether the decision of the Supreme Court of Illinois in *Moore* v. *Moyle*, 399 Ill. 230, was right or wrong is not important. The important thing is that the Supreme Court of Illinois in deciding that case as it did, established in Illinois a system whereby the common law policy of that state cannot be challenged or tested or governed by or subjected to the 14th Amendment, i.e., provides no way in which a common law rule may be attacked on the ground it is unconstitutional.

At page 13 of its Answer respondent contends that the Supreme Court of Illinois will review a case on direct appeal when a party claims he has been deprived of common law rights in violation of the Constitution and raises the point in the trial court. It cites *Smith* v. *Department of Registration*, 106 N.E. 2d 722. In that case the Department by administrative action revoked a license of a doctor to practice medicine on the basis of information possessed by members of the medical committee but not disclosed in the record. Counsel for petitioners are aware of that line of cases. *People* v. *Harrison*, 403 Ill. 320, in which one of the attorneys for petitioners was of counsel for the plaintiffs-in-error, is a good example. The case involved an indirect contempt. The Supreme Court took jurisdiction on direct appeal on the ground a constitutional question was involved because:

> "Under the decisions of this court, we are of the opinion the alleged contempt was indirect and not punishable summarily as in the case of a direct contempt. This being so, plaintiffs-in-error were entitled to be

> heard on a formal charge. * * * to have the information, petition or affidavit positively verified by an affidavit. This right was not accorded plaintiffs-in-error in the present case for the charge against them consisted only of an unverified petition filed by the State's Attorney. * * * On the record before us, and in view of our finding that the alleged contempt was indirect contempt, the summary method by which the trial court sought to punish plaintiffs-in-error denied them due process of law. Its judgments are void and are reversed."

In other words failure to comply with accepted common law procedure deprives the person against whom judgment is rendered of his life, liberty or property as the case may be, without due process of law. The contention that it does so is a constitutional question, i.e., involves a construction of the Constitution, which gives the Supreme Court of Illinois jurisdiction on direct appeal. The Appellate Court has no jurisdiction to determine that it deprives the person of his life, liberty or property without due process of law.

These cases are not authority for the proposition that the Supreme Court of Illinois has or will take jurisdiction of a case on the ground that a constitutional issue is involved when an accepted procedural or substantive common law rule, i.e., judge made law, a rule established by judicial decision, is itself attacked on the ground it deprives a person of his life, liberty or property without due process of law and denies to him the equal protection of the law.

We have conclusively shown (Petition pp. 25-32) without indulgence in flights of fancy that Illinois does not provide any method by which the common law policy of that State may be tested against the 14th Amendment to the Constitution of the United States. Only after the Supreme Court of that State has, as in this case, ended all hope of judicial correction in the state system of errors made by inferior courts that a constitutional question can be said to arise. Counsel are not required to joust with windmills by raising

a constitutional issue earlier when no review can be had of the constitutional question and any such question would be waived by appeal to the Appellate Court.

Reply to Respondent's Argument B.

Respondent claims that the action of the Supreme Court of Illinois in dismissing the writ of error can be sustained on non-federal grounds. The first ground advanced at page 16 of the Answer is that the constitutional question "was present and could have been presented in the trial court." This argument is advanced by counsel for respondent, one of whom, Loren E. Murphy of Monmouth, Illinois, as a member of the Supreme Court of Illinois wrote the opinion in *Moore* v. *Moyle*, 399 Ill. 24, holding that a motion filed in the trial court to set aside an order dismissing a complaint on the ground that the rule granting immunity to judgment to a charitable corporation was unconstitutional on specific grounds enumerated in the motion including the grounds advanced in the Petition For Writ Of Certiorari in this case did not raise a constitutional question. Let us test respondent's contention. Let us suppose that petitioners had followed the procedure followed in *Moore* v. *Moyle* and had filed a motion to set aside the order entering judgment for defendant notwithstanding the verdict on the ground that the rule of limited immunity to judgment was unconstitutional in the trial court in due time. What would have happened? It is submitted that regardless of the decision renderd by the trial court on the hypothetical motion to set aside the judgment for defendant the action would be fruitless because: 1. The motion would not raise a constitutional question (*Moore* v. *Moyle*, 399 Ill. 230); 2. Direct appeal by the losing party would not lie to the Supreme Court of Illinois (*Moore* v. *Moyle*, 399 Ill. 230); 3. If direct appeal were undertaken the cause would be

transferred to the Appellate Court (*Moore* v. *Moyle*, 399 Ill. 230); 4. If appeal were taken to the Appellate Court and no issues other than constitutional issues were raised to be determined the Appellate Court would have no jurisdiction to decide the case and would be required to transfer the cause to the Supreme Court and any decision the Appellate Court might render would be vacated by the Supreme Court (*People* v. *Kingery*, 368 Ill. 230); 4. If appeal were taken to the Appellate Court and issues other than constitutional issues were raised to be decided in addition to the constitutional questions, the constitutional questions would be waived (*Hass Electric* v. *Amusement Park Co.*, 236 Ill. 452; *Luken* v. *Lake Shore and Michigan S. Ry. Co.*, 248 Ill. 377); 6. (Returning to 3.) Following transfer to the Appellate Court, the Appellate Court would have no jurisdiction to decide the constitutional questions (*Prudential* v. *Richman*, 292 Ill. App. 261); 7. After direct appeal to the Supreme Court of Illinois and transfer to the Appellate Court should further appeal be granted by certificate of importance issued by the Appellate Court or leave to appeal granted by the Supreme Court the Supreme Court of Illinois would hold that it had decided there were no constitutional questions presented (*Moore* v. *Moyle*, 405 Ill. 555); 8. After direct appeal to the Supreme Court of Illinois and transfer to the Appellate Court should further appeal be denied and review by writ of error sought the Supreme Court would dismiss the writ of error on the same ground, i.e., that it had decided the constitutional question on direct appeal (*Moore* v. *Moyle*, 405 Ill. 555).

Obviously, it would have been absolutely futile in this case for petitioners to raise a constitutional issue in the trial court under established Illinois procedure. Counsel traveled that road in *Moore* v. *Moyle* and know the result from actual experience. Now when a litigant takes

a common sense view of the situation and advances no constitutional question in the trial or Appellate Court but defers suing out a writ of error on constitutional grounds until all possibility of review by appeal has been extinguished without fault on the part of the litigant we find that counsel for respondent including a lawyer who as judge wrote the opinion making the course suggested by them absolutely futile insist that the constitutional questions were waived because the litigant pursued the only alternative course open to him in the state judicial system rather than the futile procedure. And the Supreme Court of Illinois listens to them and dismisses the writ of error on motion without opinion and refuses to write an opinion (Rec. . .) when requested to do so (Rec. . .). Petitioners repeat: *The State of Illinois provides no means by which the common law policy of that state may be challenged or tested or governed by or subjected to the 14th Amendment.*

Respondent cites *Copperwald Steel Co.* v. *Industrial Commission*, 324 U.S. 780, in support of the proposition that the Supreme Court of the United States would not assume jurisdiction in a certiorari proceeding to require the State Supreme Court to exercise a jurisdiction which it [the State Court] found had not been conferred upon it by the laws of the State. That case stands for no such proposition. This court held that "we have no jurisdiction on appeal": "we have jurisdiction to review the decision on certiorari (28 U.S.C. 344 c)": "Inasmuch as we conclude that decision [of the State Supreme Court] was grounded upon the view that the appellant *had not pursued the remedy afforded by state law* for the vindication of any constitutional right it claimed was violated, we must dismiss the appeal and deny certiorari." (Italics ours.)

The court merely decided that the state *provided* a remedy and that the remedy *provided* had not been resorted to.

This Court decides for itself whether the state provides a remedy. If the remedy is provided then this Court will not grant certiorari when the party seeking review has not pursued it. There is no remedy here. Since it is not provided certiorari should be granted.

At page 17 of its Answer respondent seeks to limit petitioners' claim that their constitutional rights were violated by the action of the Supreme Court of Illinois dismissing their writ of error to the fact that such extension had not expired when it was dismissed. Our claim is not so limited. (See Petition, pp. 5-8.)

Rule 63 of the Supreme Court of Illinois required respondent to appear on the first day of the term as stated by respondent at page 17 of its Answer: it did not require it to file a pleading at that time, and if the rule did so require it did not require the court to pass on the motion at that time.

A device often adopted by astute appellate counsel is to give an unanswerable argument of his opponent the silent treatment in the hope that it will escape the notice of the court. It has been applied here by counsel for respondent who make no reference to the three rules of its own which the Supreme Court of Illinois violated in granting the motion to dismiss the writ of error (Pet. pp. 4-8). To refuse to apply rules of court to every litigant without discrimination is of itself to deny due process to the litigant discriminated against.

Respondent's motion to dismiss the writ of error, as stated in its Answer at page 18, alleged waiver of constitutional questions in the trial court by failure to assert them there—but there could be no waiver because under the decisions of the Supreme Court of Illinois none arose in the trial court. Its motion also alleged that the questions raised were not *such* constitutional questions as would confer juris-

diction on the Supreme Court of Illinois on writ of error. Now just precisely what sort of a constitutional question will confer such jurisdiction? And while we are about it just what kind of constitutional question does a party have to raise to get review by the Supreme Court of Illinois? Respondent's theory might well be named the doctrine of State Judicial Nullification Of The Federal Constitution for under it a constitutional question could not be determined in the Illinois judicial system unless the Illinois Appellate Court or the Illinois Supreme Court in the exercise of its discretion choose to grant further review which they declined to do in the instant case. How can the common law policy of the State be challenged or tested or governed by or subjected to the 14th Amendment under such circumstances?

The additional non-Federal ground which counsel for respondent have conjured up and which appears at page 18 of the Answer is the theory that the Supreme Court of Illinois believed that this was not one of those cases which it is required to entertain by the provisions of the Constitution of Illinois and petitioners' statutory right of review having been exhausted the Supreme Court of Illinois had no jurisdiction to review the case on writ of error. Petitioners anticipating such an argument showed it was untenable at pages 9 and 10 of their Petition. Respondent's attorneys, therefore, invent a man of straw to eliminate. They subtly suggest at page 19 of their Petition that it is petitioners' position that the constitutional question did not arise in the Appellate Court, but only arose after the Supreme Court decided the case against petitioners. What counsel for respondent overlook is the fact that the Supreme Court of Illinois has never decided the case. It has simply refused to decide it at all and has left standing the Appellate Court judgment which deprived petitioners of their rights under the 14th Amendment of the Constitution of the

United States, but which did not become the conclusive action of the State of Illinois until all power to correct the injustice was ended by extinction of all possibility of further review by appeal in the state judicial system. If the illustory proposition as stated by opposing counsel serves to illustrate anything it points up the validity of our complaint that the litigant seeking to test the constitutionality of a common law rule in Illinois is faced with entombment in a labyrinth, just as this Court has previously found was the result of the criminal procedure of that state.

Reply to Respondent's Argument C.

At page 20 of its Answer respondent states that "the fact remains that the great majority of the states" still adhere to immunity as a matter of public policy. The statement is false. A casual examination of pages 36 and 37 of the Petition and the cases fully discussed in the motion presented to the Supreme Court of Illinois to vacate the order dismissing the writ of error appearing at pages 56 to 59 and pages 47 and 48 of the Record, refute any such contention. All but about eight states would allow petitioners to recover a judgment in this case.

Respondent claims that the so-called rule of non-liability of charitable corporations in tort is an old one. That contention is refuted by the authorities cited at pages 32 to 37 of the Petition and discussed in the motion to vacate the order of dismissal appearing at pages 52 to 57 of the Record. Where immunity does exist it exists by virtue of judicial decisions promulgated after the adoption of the 14th Amendment, i.e., July 28, 1868. In Illinois it dates from 1905. Many states had no decisions on the subject of tort liability of charitable corporations until recent years and immunity has been overthrown or rejected in the vast majority of states passing on the subject since 1940. The

rule has been under constant attack in every jurisdiction in which it has been retained. The reasons given to support immunity are varied but have one element in common—none are based on common sense.

It is true, as opposing counsel state in the last paragraph on page 20 of the Answer, that there is a lack of decision holding that this particular immunity where conferred is unconstitutional. For the most part this is attributable to the fact that the number of jurisdictions which permit the survival of this erroneous doctrine is rapidly diminishing, practically all the more recent decisions having found that the common law permits no such immunity, and it was unnecessary to argue constitutionality. In part it is doubtless attributable to the fact that the constitutional issues have not been adequately considered by litigants. These reasons do not preclude the raising of constitutional issues in this case. As in *Erie R.R.* v. *Tompkins*, 304 U.S. 64, the constitutional issues although inherent in the situation created by the immunity rule have not been raised. And in that case this Court raised the constitutional questions and not the litigants.

While a state may alter or retire a common law policy under certain conditions without violating the Constitution it does not follow that it can destroy remedies willy nilly. Compensation legislation substituted remedies for remedies taken away, broadened the scope of liability, and insured recovery. Such legislation created no immunity to liability or exemption of assets from being taken to satisfy that liability. Compensation legislation only affects those voluntarily entering into the contractual relationship of employer-employee and the rights given and taken away are incident to the status thus created. Removal of liability to a guest is likewise based on a status voluntarily entered into between the parties legal results arising from that status

being known to those entering into the status. Liability may be imposed on the owner of a car as part of the responsibility of ownership of a car and the legal results are known to those who purchase automobiles.

At page 22 of the Answer it is asserted that this Court decided "that the Federal government and the States may pass on their immunity to those corporations performing the services of the state." You did nothing of the kind. *Keifer and Keifer* v. *Reconstruction Finance Corp.*, 306 U.S. 381, is authority for no such proposition. This Court merely held that when a government wanted to clothe a *public* corporation with immunity it knew how to do it, and in the absence of an express legislative declaration granting such immunity it could not be extended to it by the courts.

This Court said:

> "the government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work."

If true of public corporations how much more is it true of private charities? In Illinois the courts advance no such contention. As the court said in *Moore* v. *Moyle*, 405 Ill. 555:

> "An examination of the *Parks* case [218 Ill. 381] reveals that the sole object of the doctrine there announced was to protect the trust funds of charities from depletion through the tortious conduct of their employees and agents."

The *Keifer and Keifer* v. *Reconstruction Finance Corp.* case inevitably leads to liability when followed to its logical conclusion when the principle stated therein is applied to a private corporation such as respondent where as in this case no legislative declaration is made in the statute creating such corporation that it is endowed with immunity to judgment in an action in tort. And in our opinion any

statute attempting to clothe a private person individual or corporate with such immunity would be unconstitutional.

At page 22 of its Answer respondent refers to certain exemptions. Exemption is not immunity. No one is immune from liability to judgment by the exemptions enumerated. Municipal immunity is founded in the common law, was part of the common law of Illinois prior to July 28, 1868, and relates only to public corporations. And municipal corporations are liable in tort when not acting in a governmental capacity.

Particularly inappropriate for respondent's position is the citation of the spendthrift trust immunity as one of those rules which respondent contends the states would be compelled to alter if petitioners' contention in the instant case were to be sustained. No jurisdiction where the spendthrift trust device is permitted (there are many where it is not) has ever held that by it the beneficiary of the spendthrift trust is immune from judgment. The most that has been done is to preclude resort to a particular fund for the judgment's satisfaction. Here the Illinois Appellate Court has not been satisfied to keep trust funds from being seized to satisfy a judgment—it has held that the recovery of judgment itself is dependent upon a present existing source for the payment of the judgment.

In response to respondent's argument at page 23 of the Answer, counsel concede that the defendant was held to be a [redacted] charity by the decision of the Appellate Court and for purposes of review by this court we accept that as the law of the state. We do not concede the correctness of that decision but doubt the authority of this court to do anything about it. Under our view of the case the determination is immaterial.

The exemption of trust funds is not involved in this case; the question is immunity from *judgment*. In passing, how-

ever, the defendant has so-called trust funds set aside for the purpose of paying administrative expenses (which can be raised by capitation tax) and we doubt that under such circumstances the courts can grant the trust assets of the corporation exemption from being taken to satisfy the judgment to which petitioners are entitled.

Counsel for respondent have employed the well-recognized "scare" technique to persuade this Court of dire results to follow if this Court grants certiorari and sustains petitioners' position. Obviously, no such frightening prospect exists. Not only is the position of the Illinois courts in this case invalid under the Constitution of the United States but it is patently unjust and immoral.

Certiorari, petitioners urge, should be granted.

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